

Notes

Has Ohio Avoided the Wake of *MITE*? An Analysis of the Constitutionality of the Ohio Control Share Acquisition Act

I. INTRODUCTION

In June 1982 the Supreme Court in *Edgar v. MITE Corp.*¹ declared the Illinois Business Take-Over Act² unconstitutional. This action called into question the validity of all state takeover statutes.³ The securities community had expected the Court to base its opinion on a finding that the Williams Act preempted state regulation in the area of tender offers.⁴ The Court held, however, that the Illinois Act constituted an impermissible burden on interstate commerce because its effect could be to delay indefinitely or completely stop a pending tender offer.⁵

The Ohio General Assembly, the first state legislature to react,⁶ enacted the

1. 457 U.S. 624 (1982).

2. Public Act 80-1421, 1978 Ill. Laws 1581, repealed by Act of Sept. 14, 1983, Public Act 83-365, 1983 Ill. Legis. Serv. 2628.

3. For example, in *Telvest, Inc. v. Bradshaw*, 547 F. Supp. 791 (E.D. Va. 1982), decided three months after *MITE*, the court held that the Virginia Take-Over Bid Disclosure Act directly and indirectly violated the commerce clause. The Virginia statute, like the Illinois Act held unconstitutional in *MITE*, applied to any open market purchases, regardless of where the transaction took place and whether it affected a single in-state shareholder. *Id.* at 799. Approximately 37 states have statutes regulating tender offers. For a thorough discussion of state tender offer legislation see Ryndak, *State Takeover Statutes Under Attack—Casualties in the Battle for Corporate Control*-*MITE Corp. v. Dixon*, 30 DE PAUL L. REV. 989, 992-99 (1981).

4. The Williams Act, 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1982), added §§ 13(d)-(e) and 14(d)-(f) to the Securities Exchange Act of 1934. Tender offer will be used interchangeably with takeover offer or bid in this Note. A tender offer is generally defined as an invitation or solicitation by a company, an individual, or a group of shareholders of a corporation to buy shares of a company, usually at a price above the market price. Those accepting the offer are said to tender their stock for purchase. The offeror is typically obligated to purchase a specified portion of the tendered shares if certain conditions are met. S. REP. NO. 550, 90th Cong., 1st Sess. 2 (1967).

5. 457 U.S. 624, 640 (1982). The primary basis for finding state takeover statutes unconstitutional prior to *MITE* was that they were preempted by the Williams Act, not that they violated the commerce clause. See *infra* text accompanying notes 119-43 for a discussion of the pre-*MITE* preemption cases.

6. Since November 1982 at least seven states have enacted new legislation regulating takeovers. The Missouri and Wisconsin legislation, and part of the Minnesota legislation, are clearly modeled after the Ohio Act. See 1984 Mo. Legis. Serv. S.B. No. 409 (Vernon); 1983-85 Wis. Legis. Serv. 1983 Wis. Act 200 (West); Minnesota Business Corporation Act, MINN. STAT. §§ 302A.011 subd. 37-39, 302A.449 subd. 7, 302A.671 (West Special Pamphlet 1985). The new Kentucky, Maryland, and Michigan statutes, like the Ohio Act, are part of those states' general corporation laws. These statutes, similar in their approach, regulate all "business transactions" of a corporation and are directed primarily at the second stage of a takeover. See KY. REV. STAT. § 271A.396-.400, .405 (Supp. 1984); MD. CORPS. & ASS'NS CODE ANN. § 3-601 to 3-603 (Supp. 1984-1985); 1984 Mich. Legis. Serv. Pub. Act No. 115 (West). The Pennsylvania Act is also a part of that state's general corporation law and is applicable to all business combinations, but goes even further to protect against takeovers. See PA. STAT. ANN. tit. 15, §§ 1408, 1409.1, 1910 (Purdon Supp. 1984-1985). It has been criticized as making it a practical impossibility to effect a merger or liquidation into an affiliate and as containing an overkill provision favoring the target corporation's management. See Sell, *A Critical Analysis of a New Approach to State Takeover Legislation After MITE*, 23 WASHBURN L.J. 473, 483 (1983-1984). Only Minnesota has amended its existing take-over act, which is fashioned after the act declared unconstitutional in *MITE*. Minnesota's Amended Take-Over Act, Act of April 25, 1984, 1984 Minn. Sess. Law Serv. Ch. 488 (West), applies to any offer to acquire from any Minnesota resident publicly traded shares if at least 20% of the shares are held by Minnesota residents, when the acquisition would result in ownership of at least 10% of the company or would result in an increase in ownership of more than 5% of the company. While its jurisdictional requirement insulates the Act from the criticism that could conceivably operate to halt a

Ohio Control Share Acquisition Act⁷ to avoid the wake of *MITE*. Ohio adopted the Act in November 1982 as part of its General Corporation Law.⁸ While the constitutionality of the Ohio statute has yet to be litigated,⁹ this Note asserts that the Ohio Legislature successfully avoided the unconstitutional elements found in the Illinois statute and its prototypes. To establish this proposition, the *MITE* decision will first be analyzed in detail. Second, the relevant provisions of both the Ohio Control Share Acquisition Act and the Illinois Business Take-Over Act will be discussed. Last, the constitutionality of the Ohio Control Share Acquisition Act will be scrutinized under both preemption and commerce clause analyses.¹⁰

II. *EDGAR v. MITE CORP.*: THE DECISION

A. *Facts*

*Edgar v. MITE Corp.*¹¹ arose out of a hostile cash tender offer made by MITE, a Delaware corporation, for all the outstanding shares of Chicago Rivet and Machine Company.¹² At the commencement of the tender offer on January 19, 1979, Chicago Rivet and Machine was an Illinois corporation with twenty-seven percent of its shareholders residing in Illinois.¹³

At the onset of its tender offer MITE filed a Schedule 14D-1¹⁴ with the Securities and Exchange Commission (SEC) in Washington, in full compliance with the informational requirements of the Williams Act.¹⁵ However, MITE did not comply

nationwide tender offer without affecting any Minnesota shareholders, *see infra* text accompanying notes 42-44, the amendments empower the Minnesota Commissioner of Commerce to suspend a tender offer pending a hearing that he or she has discretion to call, a flaw which, after the *MITE* decision, is unconstitutional and one that the Ohio Act avoids. *See infra* text accompanying notes 78-80. Nevertheless, the new Minnesota Take-Over Act passed constitutional muster in *Cardiff Acquisitions, Inc. v. Hatch*, 751 F.2d 906 (8th Cir. 1984).

7. OHIO REV. CODE ANN. § 1701.831 (Page Supp. 1983).

8. The Ohio Control Share Acquisition Act was adopted as part of the amendments to the General Corporation Law of Ohio to provide a procedure for shareholder review of proposed control share acquisitions. Act of Nov. 19, 1982, H.R. Bill No. 822, 114 Gen'l Ass'y, 1983 Ohio Legis. Bull. 1 (Anderson).

9. However, the constitutionality of the Minnesota Corporation Act Amendments (*see supra* note 6) is being contested in *Educata Corp. v. Scientific Computers, Inc.*, No. 4-84968, a case pending before the United States District Court, Fourth Division, of Minnesota. The Minnesota Commissioner of Commerce, pursuant to MINN. STAT. § 80B.04 subd. 4 (West Supp. 1984), suspended the tender offer Educata was making for Scientific Computers' shares. Scientific is alleging that Educata violated §§ 13(d), 14(d), and 14(e) of the Securities Exchange Act of 1934, as well as the Minnesota Corporate Take-Overs Act, MINN. STAT. ch. 80B (West Supp. 1984), and the Minnesota Business Corporation Act, MINN. STAT. §§ 302A.011 subd. 37-39, 302A.449 subd. 7, 302A.671 (West Special Pamphlet 1985). Educata contends that the above-cited sections of the Minnesota Business Corporation Act and the Minnesota Corporate Take-Overs Act are unconstitutional as applied to its tender offer and are preempted by the Williams Act.

10. Ohio's Control Share Acquisition Act applies to all transactions involving large blocks of stock, and its effects go far beyond its impact on takeover bids. *See Kreider, Fortress Without Foundation? Ohio Takeover Act II*, 52 U. CIN. L. REV. 108, 116-19 (1983). The purpose of this Note, however, is to analyze the Act's impact on tender offers and to evaluate its constitutionality.

11. 457 U.S. 624 (1982).

12. *Id.* at 627.

13. *Id.* at 642.

14. 17 C.F.R. § 240.14d-100 (1984).

15. The Williams Act, 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1982), added §§ 13(d)-(e) and 14(d)-(f) to the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (1982). Section 14(d)(1) requires an offeror seeking to acquire more than five percent of any class of equity security by means of a tender offer to first file a Schedule 14D-1 with the SEC. The Schedule requires disclosure of (1) the source of funds used to purchase the target shares, (2) past transactions with the target company, and (3) other material financial information about the offeror. The rules promulgated by the SEC under Section 14(d) also have substantive requirements regarding tender offers. *See* 17 C.F.R. §§ 240.14d-1 to d-100 (1984).

with the requirements of the Illinois Business Take-Over Act.¹⁶ Instead, it simultaneously filed an action in the Northern District of Illinois seeking a declaratory judgment that the Illinois Act was preempted by the Williams Act and violated the commerce clause.¹⁷

B. Preemption Clause

Only three Justices,¹⁸ in an opinion by Justice White, held that the Illinois Business Take-Over Act was preempted by the Williams Act.¹⁹ Because MITE did not allege that compliance with the Illinois Act and the Securities Exchange Act of 1934²⁰ would be impossible,²¹ the Court limited its analysis of the preemption issue to a determination whether the Illinois Act was an obstacle to the accomplishment of Congress' full purposes and objectives.²² Noting that section 28(a) of the 1934 Act²³ reflected a congressional intent not to prohibit state regulation in the securities area, the plurality acknowledged that states are not prohibited from regulating takeovers.²⁴ Nevertheless, three Justices found that the Illinois Act substantially obstructed the objectives of the Williams Act.²⁵

Justice White's opinion stressed that Congress, in passing the Williams Act, intended to enact a regulatory scheme that would provide protection to investors while embracing a policy of neutrality toward both the management of the target company and the persons making the takeover bids. Justice White agreed with the Seventh Circuit's holding in *MITE Corp. v. Dixon*²⁶ that the objectives of Congress were thwarted by the Illinois Act's twenty-day precommencement notification requirement, potential for extended delay in the takeover process, and allowance for a substantial fairness review of the offer by the Illinois Secretary of State.²⁷

C. Commerce Clause

1. Indirect Burden

A majority of five Justices,²⁸ in an opinion by Justice White, held that the

16. The Illinois Act required any takeover offer for shares of a target company meeting Illinois' jurisdictional requirements, see *infra* text accompanying note 42, to be registered with the Illinois Secretary of State. Public Act 80-1421, § 4, 1978 Ill. Laws 1581, 1584-1586, repealed by Act of Sept. 14, 1983, Public Act 83-365, 1983 Ill. Legis. Serv. 2628.

17. MITE also sought a temporary restraining order and preliminary and permanent injunctions prohibiting the Illinois Secretary of State from enforcing the Illinois Act. *Edgar v. MITE Corp.*, 457 U.S. 624, 628 (1982).

18. Chief Justice Burger and Justice Blackmun joined in Justice White's opinion concerning the preemption of the Illinois statute by the Williams Act. It should be noted, however, that Justice O'Connor, having held that the Illinois statute violated the commerce clause, found it unnecessary to reach the preemption issue, and that Justices Brennan, Marshall, and Rehnquist found the case to be moot and did not reach the merits.

19. 457 U.S. 624, 634 (1982).

20. 15 U.S.C. §§ 78a-78kk (1982).

21. 457 U.S. 624, 631-32 (1982) (applying test of *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)).

22. *Id.*

23. 15 U.S.C. § 78bb(a) (1982).

24. 457 U.S. 624, 631 (1982).

25. *Id.* at 633.

26. 633 F.2d 486 (7th Cir. 1980).

27. *Id.* at 498; see 457 U.S. 624, 634 (1982).

28. Chief Justice Burger and Justices Powell, Stevens, and O'Connor joined in Justice White's opinion concerning the unconstitutionality of the Illinois statute as an indirect burden on interstate commerce. Justices Brennan, Marshall, and Rehnquist, finding the case to be moot, did not reach the merits.

Illinois Business Take-Over Act placed an unconstitutional indirect burden on interstate commerce. The Court began its analysis by noting that "[n]ot every exercise of state power with some impact on interstate commerce is invalid."²⁹ Under the balancing test of *Pike v. Bruce Church, Inc.*³⁰ a state statute will be upheld if it "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."³¹

Initially, the Court acknowledged that Illinois had a legitimate interest in protecting Illinois investors. The Court found, however, that Illinois had "no legitimate interest in protecting nonresident shareholders."³² Also, Illinois' interest in protecting in-state investors was partially undermined because the Illinois Act exempted acquisitions made by corporations of their own shares,³³ thereby depriving Illinois shareholders of protection against detrimental actions taken by the management of target corporations.³⁴ Additionally, the Illinois investors arguably were adequately protected by the Williams Act.³⁵ Finally, the Court found that the internal affairs doctrine, which allows states to regulate a corporation's relationships among or between the corporation and its current officers, directors, and shareholders, did not give states the power to regulate internal affairs of out-of-state corporations and their dealings with third parties.³⁶

The Court then considered the burden placed on interstate commerce by the Illinois Act.³⁷ Under the Act, a decision by the Illinois Secretary of State that the tender offer was not substantially fair could deprive all shareholders, in-state and out-of-state, of the opportunity to sell their shares at a premium.³⁸ Thus, after balancing Illinois' slight interest in protecting its shareholders against the significant impact that the Illinois Act could have on interstate commerce, the Court held that the Act placed an impermissible burden on interstate commerce.³⁹

2. Direct Burden

Four of the five Justices⁴⁰ who held that the Illinois Business Take-Over Act placed an unconstitutional indirect burden on interstate commerce also found the Act directly violative of the commerce clause because it regulated transactions taking place across state lines.⁴¹ These four Justices concluded that the Illinois law directly

29. 457 U.S. 624, 640 (1982).

30. 397 U.S. 137 (1970).

31. *Id.* at 142.

32. 457 U.S. 624, 644 (1982).

33. *Id.*

34. The target company in a tender offer is the corporation the securities of which are the subject of the tender offer.

35. 457 U.S. 624, 644-45 (1982).

36. *Id.* at 645-46.

37. *Id.* at 646.

38. *Id.* at 643.

39. *Id.* at 646.

40. Chief Justice Burger and Justices O'Connor and Stevens joined in Justice White's opinion concerning the unconstitutionality of the Illinois statute as a direct burden on interstate commerce. Justices Brennan, Marshall, and Rehnquist, finding the case to be moot, did not reach the merits.

41. 457 U.S. 624, 641 (1982).

regulated interstate commerce because the Illinois law could have prevented MITE from making its offer and concluding its transactions not only in Illinois and with Illinois shareholders, but with all Chicago Rivet shareholders, seventy-three percent of whom were not residents of Illinois.⁴² Furthermore, the Act applied to any target corporation meeting two of the three following conditions: (1) having its principal executive office in Illinois; (2) being incorporated in Illinois; and (3) having at least ten percent of its stated capital and paid-in surplus within Illinois.⁴³ Therefore, the Act potentially could be applied to regulate a tender offer "that would not affect a single Illinois shareholder."⁴⁴

III. THE OHIO CONTROL SHARE ACQUISITION ACT: WHAT'S NEW?

Ohio was the first state to pass legislation intended to avoid the Supreme Court's holding in *MITE*.⁴⁵ Without repealing the Ohio Takeover Act,⁴⁶ the General Assembly of Ohio in November 1982 enacted the Ohio Control Share Acquisition Act.⁴⁷ The Act amended the General Corporation Law⁴⁸ in order "to provide a mechanism for shareholder review of proposed control share acquisitions."⁴⁹

A. Scope

The Act applies to control share acquisitions of stock of "issuing public corporations."⁵⁰ Issuing public corporations are defined as those corporations (1) incorporated in Ohio; (2) having fifty or more shareholders; (3) having either principal place of business, principal executive office, or substantial assets in Ohio; and (4) having no valid close corporation agreement in existence.⁵¹ A corporation coming within the definition of issuing public corporation may opt out of the Act's purview by so providing in its articles or regulations.⁵²

"Control share acquisitions"⁵³ are defined to include not only hostile or friendly tender offers, but all open market purchases and privately negotiated block transactions that would result in the acquiring party possessing voting power, alone or with others, over stock in any one of three zones of control.⁵⁴ The three zones are (1)

42. *Id.*

43. The Illinois Business Take-Over Act, Public Act 80-1421, § 2.10, 1978 Ill. Laws 1581, 1583-1584, *repealed* by Act of Sept. 14, 1983, Public Act 83-365, 1983 Ill. Legis. Serv. 2628.

44. 457 U.S. 624, 642 (1982).

45. Since November 1982, at least seven states have enacted legislation directed at regulating takeovers. *See supra* note 6.

46. OHIO REV. CODE ANN. § 1707.041 (Page Supp. 1983). After Congress' passage of the Williams Act in 1968, Ohio was one of the first states to enact a takeover law providing for administrative review of the offeror's disclosure materials, and further providing that review procedures could be waived by the board of directors of the issuer. In 1969, § 1701.041 was enacted as part of Ohio's securities laws to be administered by the Division of Securities of the Department of Commerce. Kreider, *supra* note 10, at 110.

47. OHIO REV. CODE ANN. § 1701.831 (Page Supp. 1983).

48. OHIO REV. CODE ANN. §§ 1701.01-.99 (Page 1978 & Supp. 1983).

49. Act of Nov. 19, 1982, H.R. Bill No. 822, 114 Gen'l Ass'y, 1983 Ohio Legis. Bull. 1 (Anderson).

50. OHIO REV. CODE ANN. § 1701.831(A) (Page Supp. 1983).

51. *Id.* § 1701.01(Y).

52. *Id.* § 1701.831(A).

53. *Id.* § 1701.01(Z).

54. Kreider, *supra* note 10, at 112.

one-fifth to one-third, (2) one-third to one-half, and (3) more than one-half of the voting power.⁵⁵ Before an acquiring person moves into a zone of control, whether it be by an initial acquisition of more than twenty percent of the shares or a move from one control zone to another, shareholder approval must be obtained pursuant to the statute.⁵⁶

The Act exempts acquisitions that occurred prior to its effective date, acquisitions that occur pursuant to the laws of descent and distribution or pursuant to the satisfaction of a pledge or other security interest, and acquisitions occurring pursuant to a statutory merger or consolidation.⁵⁷ In addition, shareholders who properly acquire a control share block by gaining shareholder authorization or who effect an exempt acquisition may freely transfer the control block to another unless this transfer would entitle the transferee to exercise voting power of a range different from that of the transferor.⁵⁸ This form of exemption, however, is available only to the original transferor;⁵⁹ the recipient must have a separate exemption or obtain shareholder approval before reselling the control block.

B. Requirements

Any person, group, or corporation that proposes to make a control share acquisition must obtain shareholder approval.⁶⁰ To obtain the requisite approval, the offeror⁶¹ must deliver an Acquiring Person Statement⁶² to the management of the target corporation.⁶³ This statement must set forth: (1) the identity of the acquiring person; (2) a statement that it is the Acquiring Person Statement; (3) the number of shares of the issuing public corporation directly or indirectly owned by the acquiring person; (4) the range of voting power under which the proposed control share acquisition would fall; (5) a description of the terms of the proposed acquisition; and (6) representations that the acquisition is legal and the acquiring person has the financial capacity to make the proposed acquisition.⁶⁴

Within ten days of receiving an Acquiring Person Statement, the issuing public

55. OHIO REV. CODE ANN. § 1701.01(Z)(1)(a)-(c) (Page Supp. 1983).

56. *Id.* § 1701.831.

57. *Id.* § 1701.01(Z)(2)(a)-(e).

58. A person owning a block of shares controlling twenty-five percent of a company prior to November 18, 1982 could sell the block as augmented up to thirty-three and one-third percent to a buyer without statutory approval unless the transaction caused the recipient to own over one-third of the voting power. However . . . the buyer would be forced to either engage in a transaction subject to the delays and uncertainties of the approval process or to divide the block so that no transferee would hold twenty percent or more of the issuer.

Kreider, *supra* note 10, at 114.

59. *Id.*

60. OHIO REV. CODE ANN. § 1701.831(A) (Page Supp. 1983).

61. For purposes of this Note, the acquiring person will be the tender offeror in a takeover bid. The tender offeror is the soliciting company, individual, or group seeking to acquire the securities of the target company. *See supra* note 34.

62. OHIO REV. CODE ANN. § 1701.01(BB) (Page Supp. 1983).

63. *Id.* § 1701.831(B).

64. *Id.* § 1701.831(B)(1)-(6).

This portion of the statute would require, for example, that a New York resident desiring to purchase twenty-one percent of the stock of an Ohio-based corporation from a California resident in a private transaction would give to the Ohio corporation details of the proposed transaction including a balance sheet to show financial capacity.

Kreider, *supra* note 10, at 113.

corporation⁶⁵ must call a special shareholders meeting for the purpose of voting on the proposed acquisition. This meeting must take place within fifty days of receipt of the statement.⁶⁶ All shareholders, regardless of their voting rights, must receive prompt notice accompanied by a copy of the Acquiring Person Statement. In addition, they must receive a statement by the target company of its position or recommendation on the proposed transaction, or a statement that it is taking no position and its reasons therefore.⁶⁷

C. Application

The offeror obtains the requisite shareholder approval if a quorum is present at the meeting of shareholders called to vote on the proposed control share acquisition, and if both a majority of the voting power of the shares represented in person or by proxy and a majority of the voting power of the disinterested shares vote in favor the proposed acquisition.⁶⁸ The quorum requirement is met when at least a majority of the shares entitled to vote in the election of directors and a majority of the disinterested shares is represented at the meeting in person or by proxy.⁶⁹ A disinterested majority excludes votes on shares owned or controlled by the offeror, and votes by officers and directors who are also employees of the target company.⁷⁰ The acquiring person then has one year in which to consummate the approved control share acquisition.⁷¹

IV. THE ILLINOIS BUSINESS TAKE-OVER ACT DECLARED UNCONSTITUTIONAL IN *MITE*

The Illinois Business Take-Over Act⁷² declared unconstitutional by the Supreme Court in *MITE* purported to regulate all takeover offers of target companies. The Act defined a "take-over offer" as an offer to acquire any equity security of a target company if, after the acquisition, the offeror would be the beneficial owner of more than five percent of any class of equity security of the target corporation.⁷³ The Act exempted from its coverage offers made by an issuer to purchase its own shares of stock. Also excluded were offers that Illinois' Secretary of State determined did not require regulation under the statute for the protection of Illinois shareholders of the

65. For purposes of this Note, the issuing public corporation will be the target in a takeover bid. See *supra* notes 34 and 61.

66. OHIO REV. CODE ANN. § 1701.831(C) (Page Supp. 1983).

67. *Id.* § 1701.831(D).

68. *Id.* § 1701.831(E)(1).

69. *Id.*

70. "Interested shares" means the shares of an issuing public corporation in respect of which any of the following persons may exercise or direct the exercise of the voting power of the corporation in the election of directors: (1) An acquiring person; (2) Any officer of the issuing public corporation elected or appointed by the directors of the issuing public corporation; (3) Any employee of the issuing public corporation who is also a director of such corporation.

Id. § 1701.01(CC).

71. *Id.* § 1701.831(E)(2).

72. Public Act 80-1421, 1978 Ill. Laws 1581, *repealed by* Act of Sept. 14, 1983, Public Act 83-365, 1983 Ill. Legis. Serv. 2628.

73. *Id.* at 1583.

target company and did not have the effect of changing or influencing the control of the target company.⁷⁴

The target companies coming under the protective umbrella of the Act were those corporations in which Illinois shareholders owned ten percent of any class of equity securities or those meeting any two of the following three conditions: (1) having principal executive offices in Illinois; (2) being incorporated in Illinois; and (3) having at least ten percent of their stated capital and paid-in surplus within Illinois.⁷⁵

The offeror was required to file a detailed registration statement with the Secretary of State before making the tender offer.⁷⁶ The takeover offer became effective automatically unless the Secretary called a hearing prior to twenty business days after the date the registration statement was filed.⁷⁷ A hearing could be called if the Secretary determined it necessary for the protection of offerees, if a majority of the outside directors of the target company so requested, or if Illinois shareholders owning ten percent of a class of equity securities so requested.⁷⁸ The Secretary could indefinitely postpone commencement of the hearing for the convenience of the parties or for the protection of the Illinois offerees.⁷⁹

The Secretary had authority to deny registration of the takeover offer or to condition registration upon certain changes or modifications if he or she found that: (1) the takeover offer failed to provide full and fair disclosure of all material information concerning the offer; (2) the offer was inequitable or would work a fraud or deceit upon the offerees; (3) the offer would not be made to all offerees in Illinois on substantially equal terms; or (4) the offer would violate the Illinois Business Take-Over Act.⁸⁰ Thus, the Secretary of State was given broad powers to adjudicate the substantive fairness of the takeover offer.

V. THE PREEMPTION ISSUE

Prior to *MITE*, several courts⁸¹ held that state takeover statutes not unlike the Illinois Act were in violation of the supremacy clause.⁸² These courts reasoned that the Williams Act preempted state regulation of securities transactions. Assuming *arguendo* the continuing vitality of these cases, a review of the Williams Act, the holdings of the cases, and the Ohio Control Share Acquisition Act demonstrate the constitutionality of the new Ohio Act.

74. *Id.*

75. *Id.* at 1584.

76. *Id.*

77. *Id.* at 1586.

78. *Id.* at 1587.

79. *Id.*

80. *Id.*

81. See, e.g., *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122 (8th Cir. 1982); *Kennecott Corp. v. Smith*, 637 F.2d 181 (3d Cir. 1982); *Great W. United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *rev'd on other grounds sub. nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979); *Empire, Inc. v. Ashcroft*, 524 F. Supp. 898 (W.D. Mo. 1981); *Natomas Co. v. Bryan*, 512 F. Supp. 191 (D. Nev. 1981); *Crane Co. v. Lam*, 509 F. Supp. 782 (E.D. Pa. 1981); *Canadian Pac. Enter. (U.S.), Inc. v. Krouse*, 506 F. Supp. 1192 (S.D. Ohio 1981).

82. U.S. CONST. art. VI, § 2.

A. The Williams Act

The Williams Act,⁸³ a series of amendments to the Securities Exchange Act of 1934, was enacted in 1968 to close a gap in investor protection under the federal securities laws. This gap had been created by the increased use of cash tender offers to gain control of publicly owned corporations.⁸⁴ Prior to the passage of the Williams Act only takeover offers involving the exchange of stock were within the protective realm of the federal securities laws. Consequently, cash tender offers increasingly were used as a method of secretly acquiring control of publicly held corporations.⁸⁵ The disclosure required by the offeror was minimal, including only the identity of the security to be tendered, the amount offered per share, the minimum number of shares required to obligate the offeror, the tender period, and the name and address of the depository, which was usually a bank. Importantly, disclosure of the tender offeror's identity or plans regarding the target company was not required.⁸⁶

In *Piper v. Chris-Craft Industries*⁸⁷ the Supreme Court held that Congress' sole purpose in enacting the Williams Act was to protect investors confronted with a tender offer.⁸⁸ Congress viewed the Act as necessary to protect shareholders of target companies from takeover bidders who often operated covertly.⁸⁹ Congress, however, also recognized that takeover bids could serve the useful and sometimes necessary purpose of providing a check on entrenched, inefficient management.⁹⁰ The Act, therefore, was not aimed at obstructing or unduly impeding cash takeover bids, but was intended to provide investors faced with a cash tender offer with the information they needed to make an informed investment decision about whether to retain or sell the security.⁹¹

The legislation was intended to "balance the scales equally to protect the legitimate interests of the corporation, management, and shareholders without unduly impeding cash takeover bids."⁹² The Act seeks to maintain this balance by requiring the tender offeror to disclose certain material facts including the tender offeror's

83. 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1982).

84. 113 CONG. REC. S854 (daily ed. Jan. 18, 1967) (statement of Sen. Williams).

85. See W. CARY & M. EISENBERG, CASES AND MATERIALS ON CORPORATIONS 1563 (5th ed. unabr. 1980).

86. Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 YALE L.J. 510, 512 (1979).

87. 430 U.S. 1 (1977).

88. *Id.* at 28.

89. Today, there are those individuals in our financial community who seek to reduce our proudest businesses into nothing but corporate shells. They seize control of the corporation with unknown sources, sell or trade away the best assets, and later split up the remains among themselves. The tragedy of such collusion is that the corporation can be financially raped without management or shareholders having any knowledge of the acquisitions The corporate raider may thus act under a cloak of secrecy while obtaining the shares needed to put him on the road to a successful capture of the company.

113 CONG. REC. S857-58 (daily ed. Jan. 18, 1967) (statement of Sen. Kuchel) (emphasis added); see also *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 28 (1977).

90. H.R. REP. NO. 1711, 90th Cong., 2d Sess. 2, reprinted in 1968 U.S. CODE CONG. & AD. NEWS 2811, 2813 [hereinafter cited as H.R. REP. NO. 1711].

91. "The purpose of this bill is to require full and fair disclosure for the benefit of stockholders while at the same time providing the offeror and management equal opportunity to fairly present their case." 113 CONG. REC. S854-55 (daily ed. Jan. 18, 1967) (statement of Sen. Williams).

92. *Id.* at S854.

identity, background, and plans regarding the target corporation.⁹³ The Act further protects this balance by requiring disclosure of material information regarding repurchases of stock by a corporation.⁹⁴

The SEC has promulgated regulations to effectuate the Williams Act.⁹⁵ Those regulations specifically covering tender offers, promulgated under section 14(d),⁹⁶ can be divided into four categories: (1) filing requirements; (2) dissemination provisions; (3) disclosure requirements; and (4) substantive provisions.⁹⁷ Rule 14d-2(b),⁹⁸ which contains elements from each of these four categories, has been a principal source of preemption litigation. The rule requires an offeror to commence or withdraw the tender offer within five business days of the first public announcement of the tender offer.⁹⁹ Compliance with the precommencement registration requirements of a state takeover statute, such as the Illinois Business Take-Over Act or a similar statute,¹⁰⁰ suffices to trigger the commencement of a tender offer under Rule 14d-2(b). Although the filing of state precommencement materials starts the tender offer for purposes of Rule 14d-2(b), a number of state statutes do not permit the offer to commence until the conclusion of an applicable waiting period and hearing process.¹⁰¹ Thus, a conflict exists between Rule 14d-2(b) and state takeover statutes that require more than a five day precommencement registration filing.¹⁰²

Some states have avoided this seemingly direct conflict by amending their statutes to require a filing with their state officer up to five days before or on the date of commencement of the tender offer.¹⁰³ After the 1980 enactment of Rule 14d-2(b), several courts held precommencement provisions of takeover statutes that were more than five days in length to be preempted.¹⁰⁴ In 1982 the District Court for the Southern District of Ohio held in *Canadian Pacific Enterprises (U.S.), Inc. v. Krouse*¹⁰⁵ that Rule 14d-2(b) preempted the provision in the Ohio Takeover Act¹⁰⁶

93. H.R. REP. NO. 1711, *supra* note 90, at 2814.

94. *Id.* at 2814-15; *see also* 15 U.S.C. § 78m(e) (1982). One weakness the Supreme Court found in Illinois' "investor protection" argument was that the Illinois statute exempted a corporation from complying with the disclosure requirements when purchasing its own stock. *See supra* text accompanying note 33-34.

95. Regulation 14D, 17 C.F.R. § 240.14d-1 to d-9 (1984).

96. 15 U.S.C. § 78m(d) (1982).

97. [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,373, at 82,579 (Dec. 19, 1979).

98. 17 C.F.R. § 240.14d-2(b) (1984).

99. *Id.*

100. IDAHO CODE § 30-1503 (Supp. 1984); MICH. COMP. LAWS ANN. § 451.905 (West Supp. 1984-1985); MO. ANN. STAT. § 409.515(1) (Vernon 1979); N.J. STAT. ANN. § 49:5-3(a) (West Supp. 1984-1985); VA. CODE § 13.1-531 (Supp. 1984).

101. [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,373, at 82,584 (Dec. 19, 1979).

102. The SEC acknowledged that its adoption of Rule 14d-2(b) appeared to produce a conflict with state precommencement waiting period provisions that is "so direct and substantial as to make it impossible to comply with both sets of requirements as they presently exist." SEC Release No. 34-16,384, [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,373, at 82,584 (Dec. 19, 1979), *quoted in* Sargent, *On the Validity of State Takeover Regulation: State Responses to MITE and Kidwell*, 42 OHIO ST. L.J. 689, 696 (1981).

103. *See* IND. CODE ANN. § 23-2-3.1 to .3 (West Supp. 1984-1985); MASS. ANN. LAWS ch. 110C, § 2 (Michie/Law. Co-op Supp. 1984); N.Y. BUS. CORP. LAW § 1602 (McKinney Supp. 1983-1984); OKLA. STAT. ANN. tit. 71, § 435 (West Supp. 1984-1985).

104. *See, e.g.,* Empire, Inc. v. Ashcroft, 524 F. Supp. 898, 904 (W.D. Mo. 1981); Natomas Co. v. Bryan, 512 F. Supp. 191, 193 (D. Nev. 1981); Crane Co. v. Lam, 509 F. Supp. 782, 786 (E.D. Pa. 1981); Kennecott Corp. v. Smith, 507 F. Supp. 1206, 1219 (D.N.J. 1981).

105. 506 F. Supp. 1192 (S.D. Ohio 1981).

106. OHIO REV. CODE ANN. § 1707.041 (Page Supp. 1983).

requiring public announcement of a proposed takeover bid at least twenty days before it was made.¹⁰⁷ Less than two years earlier the same court, in *AMCA International Corp. v. Krouse*,¹⁰⁸ had upheld the constitutionality of the same provision in the Ohio Takeover Act.¹⁰⁹ In *AMCA International*, however, Judge Kinneary had noted that his decision antedated the SEC's adoption of Rule 14d-2(b) and that the Ohio Act would indisputably be preempted when the new rule became effective.¹¹⁰

Some courts have upheld the validity of state takeover statutes notwithstanding a difference between the state and federal filing requirements.¹¹¹ These courts reconcile the operation of the federal and state statutory schemes by superimposing them. Because the state statutes have the same objective as the Williams Act—investor protection—a state takeover statute is not preempted merely because its provisions are different from those chosen by Congress.¹¹²

B. Preemption Cases

In enacting the Securities Exchange Act of 1934, Congress explicitly chose not to preclude state legislation regarding the exchange of securities.¹¹³ The language of section 28(a) is straightforward: "Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder."¹¹⁴

"Thomas Corcoran, a principal draftsman of the 1934 Act, indicated to Congress that the purpose of section 28(a) was to leave the states with as much leeway to regulate securities transactions as the Supremacy Clause would allow them in the absence of such a provision."¹¹⁵ Section 28(a) was intended to protect, not limit, state authority.¹¹⁶

Congress, when it so chooses, may preempt a field or enact a scheme of federal regulation which is so pervasive that an intent to preempt can be inferred.¹¹⁷ State regulation of securities also is preempted if it directly or indirectly conflicts with federal law by obstructing the accomplishment of Congress' full purposes and objectives.¹¹⁸

The courts that, prior to *MITE*, held state takeover statutes preempted by the Williams Act found that the state statutes interfered with what has been termed the

107. 506 F. Supp. 1192, 1204 (S.D. Ohio 1981). "We find that the SEC adopted its preemptive rule with deliberate and rationally justifiable purpose to accomplish a permissible regulatory objective." *Id.* at 1203.

108. 482 F. Supp. 929 (S.D. Ohio 1979).

109. *Id.*

110. *Id.* at 933, 934 n.4.

111. See, e.g., *Wylain, Inc. v. TRE Corp.*, 412 A.2d 338 (Del. Ch. 1980); *Unitrode Corp. v. Dynamics Corp. of Am.*, 379 Mass. 487, 491, 399 N.E.2d 5, 7 (1980).

112. *City Investing Co. v. Simcox*, 633 F.2d 56 (7th Cir. 1980); see also *Unitrode Corp. v. Dynamics Corp. of Am.*, 379 Mass. 487, 491, 399 N.E.2d 5, 7 (1980); *Sharon Steel Corp. v. Whaland*, 121 N.H. 607, 433 A.2d 1250 (1981).

113. 15 U.S.C. § 78bb(a) (1982).

114. *Id.*

115. *Leroy v. Great W. United Corp.*, 443 U.S. 173, 182 n.13 (1979).

116. *Id.* at 182.

117. *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 236 (1947).

118. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Williams Act's "market approach" to investor protection.¹¹⁹ According to the market approach theory, the function of federal regulation is to maintain a free flow of information between the tender offeror and the target so that shareholders can be informed enough to make their own knowledgeable and unfettered choices about whether to relinquish their shares for a cash premium.¹²⁰ According to the theory, when the commencement of an offer is delayed "the market approach cannot be effectuated, because the choice can no longer be an informed one."¹²¹

In *Great Western United Corp. v. Kidwell*,¹²² the first case in which a federal court ruled on the constitutionality of a state takeover law, the Fifth Circuit held that the Idaho takeover statute¹²³ was preempted. The court found Idaho's fiduciary approach to investor protection incompatible with the market approach established by Congress.¹²⁴

In *Kennecott Corp. v. Smith*¹²⁵ the Third Circuit held that provisions of the New Jersey Corporation Takeover Bid Disclosure Law¹²⁶ conflicted with the SEC regulations promulgated under the Williams Act and thus were preempted.¹²⁷ The provisions were found to "prevent prompt disclosure of crucial information to the shareholders, and, through delay, to shift the advantage in this struggle to incumbent management."¹²⁸ The court held that this effect was inimical to the federal policy requiring prompt dissemination of all material information after the first public announcement.¹²⁹

The Eighth Circuit endorsed this reasoning in *National City Lines, Inc. v. LLC Corp.*¹³⁰ and struck down provisions of the Missouri Takeover Bid Disclosure Act¹³¹ that required substantially more disclosure than the Williams Act. Among the objectionable sections was an open-ended disclosure provision that gave the Commissioner of Securities the ability to request as much additional information as he or she deemed necessary to protect the public.¹³² Finding that "disclosure of a mass of irrelevant data can confuse the investor and obscure relevant disclosures,"¹³³ causing

119. See generally Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 TEX. L. REV. 1, 1-46 (1978). Congress reaffirmed its choice of a market approach to investor protection in the tender offer area in the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18(a) (1982).

120. *Kennecott v. Smith*, 637 F.2d 181, 187-88 (3d Cir. 1980).

121. *Id.* at 189.

122. 577 F.2d 1256 (5th Cir. 1978), *rev'd on other grounds sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979).

123. IDAHO CODE § 30-1501(5)(e) (1980).

124. "Instead of relying upon investors' decisions after full disclosure, Idaho relies upon the business judgment of corporate directors with a fiduciary duty to their shareholders. Idaho's 'fiduciary approach' to investor protection may be one way to protect shareholders, but it is an approach Congress rejected." *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1279 (5th Cir. 1978) (emphasis added in original), *rev'd on other grounds sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979).

125. 637 F.2d 181 (3d Cir. 1980).

126. N.J. STAT. ANN. § 49:5-3(a) (West Supp. 1984-1985).

127. 637 F.2d 181, 191 (3d Cir. 1980).

128. *Id.* at 187.

129. *Id.* at 188; see Rule 14d-2(b), 17 C.F.R. § 240.14d-2(b) (1984).

130. 687 F.2d 1122 (8th Cir. 1982).

131. MO. ANN. STAT. § 409.515 (Vernon 1979).

132. 687 F.2d 1122, 1131 (8th Cir. 1982).

133. *Id.* (quoting *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1280 (1978)).

"more harm than good,"¹³⁴ the court ruled that these disclosure requirements conflicted "with the Williams Act's goal of unfettered choice by well-informed investors."¹³⁵

In *National City Lines* the Eighth Circuit also held that the Missouri Act's twenty day precommencement requirement and opportunity for a hearing upset the congressionally designed balance by creating delay between the commencement and consummation of a tender offer.¹³⁶ Because management of the target company could use the time during which the hearings were underway and the tender offer was suspended to formulate its defense, the court found the delay to be inconsistent with the scheme of the Williams Act.¹³⁷ Further, the court found that the Missouri Act's substantive requirements¹³⁸ conflicted with the SEC rules¹³⁹ regulating tender offers. Finally, the court held that the Missouri Act impermissibly discriminated against nonapproved tender offers by exempting from regulation offers that were approved by the target company's board of directors.¹⁴⁰

The Delaware Tender Offers Act was also found to be rife with provisions conflicting with the Williams Act in *Dart Industries, Inc. v. Conrad*.¹⁴¹ In *Dart* the court specifically objected to the delay injected into the tender offer procedure by the Delaware Act. The court described delay as the single most effective weapon a target company could utilize to defeat a tender offer.¹⁴² The court also faulted the provisions that discriminated against the original offerors in favor of subsequent offerors. The Delaware Act mandated that the original offeror comply with a requisite waiting period before commencing the tender offer. However, it allowed subsequent or competing offerors to purchase securities tendered pursuant to their competing offers at the same time the original offeror was permitted to purchase them, without complying with a waiting period requirement.¹⁴³

Since *MITE*, only one circuit addressing the constitutionality of state takeover statutes has based its decision directly on preemption grounds.¹⁴⁴ Other courts have only tangentially addressed the issue, intimating what they might hold in the future.¹⁴⁵ In *Agency Rent-A-Car, Inc. v. Connolly*,¹⁴⁶ decided less than two months after *MITE*, the First Circuit held that a one-year ban, imposed pursuant to the Massachusetts takeover statute,¹⁴⁷ on a takeover bidder's subsequent purchases of a

134. *Id.* (quoting *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 448 (1976)).

135. *Id.*

136. *Id.* at 1130.

137. *Id.* Departure from neutrality is one of the principal grounds for arguing that State statutes are preempted by the Williams Act. See also *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1278 (5th Cir. 1978), *rev'd on other grounds sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979).

138. MO. ANN. STAT. § 409.505(3)(d) (Vernon 1979).

139. 17 C.F.R. §§ 240.14d-1 to -100 (1984).

140. 687 F.2d 1122, 1132 (8th Cir. 1982).

141. 462 F. Supp. 1, 13 (S.D. Ind. 1978).

142. *Id.* at 11.

143. DEL. CODE ANN. tit. 8, § 203(b)(2) (1983).

144. *Agency Rent-A-Car, Inc. v. Connolly*, 686 F.2d 1029 (1st Cir. 1982).

145. *North Star Int'l v. Arizona Corp. Comm'n*, 720 F.2d 578 (9th Cir. 1983); *Buffalo Forge Co. v. Ogden Corp.*, 717 F.2d 757 (2d Cir. 1983).

146. 686 F.2d 1029 (1st Cir. 1982).

147. MASS. ANN. LAWS ch. 110C, § 1-13 (Michie/Law. Co-op. Supp. 1984).

target company's securities was not preempted by the Williams Act.¹⁴⁸ The First Circuit found that the Supreme Court cases of the last decade evidenced "a new solicitude toward state interests and an elevation of the threshold of conflict required before a state statute" will be declared unconstitutional.¹⁴⁹

In *Edgar v. MITE Corp.*¹⁵⁰ only three Justices found provisions of the Illinois Business Take-Over Act preempted.¹⁵¹ *MITE* therefore cannot stand for a broad preemption principle under which any state regulation of tender offers must be invalidated.¹⁵² Indeed, *MITE* renders the holdings of the pre-*MITE* preemption cases suspect.

The Williams Act is essentially a disclosure statute. It does not attempt to deal with all aspects of a tender offer, nor does it depend on exclusivity for the effective protection of shareholders.¹⁵³ While state standards are frequently more stringent than the federal standards, it is possible to comply with both.¹⁵⁴ To properly approach preemption cases, courts should attempt to reconcile the operation of both the state and federal laws so as to avoid complete invalidation of the state law.¹⁵⁵

In the above cases the state statutes were preempted because they obstructed Congress' objective of providing a market approach to investor protection.¹⁵⁶ It should follow, then, that if a state statute does not operate to block or even delay the free flow of information, but effectuates such flow, it does not block the accomplishment of the full purposes and objectives of Congress and, hence, is not preempted.

C. Preemption and the New Ohio Act

The Ohio Control Share Acquisition Act does not obstruct the accomplishment and execution of the full purposes of Congress. It, like the Williams Act, ensures that full information is conveyed as soon as possible to the shareholders of a target company so they may exercise an informed investment decision, and does not tip the scales in favor of either the tender offeror or the target management.

Unlike the Illinois Business Take-Over Act, which was part of the Illinois Securities Law, the Ohio Control Share Acquisition Act is part of the General Corporation Law of Ohio¹⁵⁷ and applies to all acquisitions of significant amounts of stock of Ohio corporations meeting certain jurisdictional requirements.¹⁵⁸ Thus,

148. 686 F.2d 1029, 1038-39 (1st Cir. 1982). The court found that the delay was not inconsistent with the Williams Act's policy of investor protection when the delay was easily avoided by compliance with the statute.

149. *Id.* at 1037-38; see also *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974).

150. 457 U.S. 624 (1982).

151. White, J., writing for the plurality; Burger, C.J.; and Blackmun, J. *But see supra* note 18.

152. *Agency Rent-A-Car, Inc. v. Connolly*, 686 F.2d 1029, 1036 (1st Cir. 1982).

153. See Note, *supra* note 86, at 519-20.

154. *Id.*

155. *Agency Rent-A-Car, Inc. v. Connolly*, 686 F.2d 1029, 1036 (1st Cir. 1982).

156. See *supra* notes 119-21 and accompanying text.

157. OHIO REV. CODE ANN. §§ 1701.01-.99 (Page 1978 & Supp. 1983). A state's general corporation law is global in nature and governs the internal operations of the companies incorporated within the state. In contrast, a state's securities laws, or blue sky laws, are territorial in nature, covering only offers, purchases, and sales which are to some substantial extent made in or from the state. Residence, domicile of participants, and place of organization of the issuer are usually immaterial to the operations of state securities laws. Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 CASE W. RES. 722, 740 (1970); see *supra* text accompanying note 48.

158. OHIO REV. CODE ANN. § 1701.01(Y) (Page Supp. 1983); see *supra* text accompanying notes 50-51.

rather than regulating sales of securities as the Illinois Act did, the Ohio Act merely regulates the internal affairs of corporations. Its only disclosure requirement is that the offeror file a statement with the target corporation, which must be an Ohio corporation.¹⁵⁹ In contrast, the Illinois Act ostensibly could have been applied when the target corporation was incorporated outside Illinois and had its principal executive office and ten percent of its stated capital and paid-in surplus in Illinois—regardless of whether any Illinois residents were shareholders.¹⁶⁰ The Illinois Act also required the offeror to make filings with the Illinois Secretary of State as well as with the target corporation.¹⁶¹ Under the Ohio Act, an offeror is only required to file an Acquiring Person Statement with the target company.¹⁶²

The Ohio Control Share Acquisition Act merely requires the target company to call a special shareholders meeting within ten days of receipt of the Acquiring Person Statement. The shareholders must be given notice of the meeting as soon as is reasonably possible. The notice must be accompanied by a copy of the offeror's Acquiring Person Statement and a statement of the target company's position on the tender offer, including an explanation of why it has taken that position.¹⁶³ No provision exists which discriminates between tender offers. Accordingly, a competing tender offer, even though approved by the target's management, could not go forward without a shareholder vote.¹⁶⁴ The purpose of the Williams Act is to let tender offers go forward for the benefit of shareholders after they receive enough information to make an informed decision on whether or not to tender their shares; the Ohio Act effectuates this purpose.

The disclosure requirements of the Ohio Act are not unduly burdensome or more substantial than those of the Williams Act.¹⁶⁵ The requisite Acquiring Person Statement provides the shareholders with information concerning the acquiring person that is essential for the shareholders to make informed decisions.¹⁶⁶ Substantively, the Ohio Act does not interfere with the Williams Act.¹⁶⁷ The only timetables it prescribes are the ten day limit by which the shareholders meeting must be called and the fifty day limit within which the meeting must be held. The tender offer can still commence within five days of the first public announcement pursuant to Rule 14d-2(b). Under the Williams Act and rules promulgated thereunder¹⁶⁸ shareholders tendering their shares can withdraw them any time before fifteen days and after sixty days from the date of commencement of the offer.¹⁶⁹ Therefore, the Ohio Act's provision that conditions the offering of shares on the ultimate approval of the

159. *Id.*

160. Public Act 80-1421, § 2.10, 1978 Ill. Laws 1581, 1583-1584, *repealed by* Act of Sept. 14, 1983, Public Act 83-365, 1983 Ill. Legis. Serv. 2628; *see supra* text accompanying notes 43-44.

161. Public Act 80-1421, 1978 Ill. Laws 1581, 1584, *repealed by* Act of Sept. 14, 1983, Public Act 83-365, 1983 Ill. Legis. Serv. 2628.

162. *See supra* notes 61-64 and accompanying text.

163. OHIO REV. CODE ANN. § 1701.831(D) (Page Supp. 1983); *see supra* text accompanying notes 65-67.

164. Public Act 80-1421, § 203(b)(91) (1979); IDAHO CODE § 30-1501(5)(e) (1980 & Supp. 1983); ILL. ANN. STAT. ch. 121 1/2, § 237.52-9(5) (Smith-Hurd Supp. 1983-1984).

165. *Contra* MO. ANN. STAT. § 409.515.2 (Vernon 1979); *see supra* text accompanying notes 130-32.

166. OHIO REV. CODE ANN. § 1701.831(B) (Page Supp. 1983); *see supra* text accompanying notes 62-64.

167. *Contra* DEL. CODE ANN. tit. 8, § 203(a)(2)-(3) (1983); MO. ANN. STAT. § 409.510 (Vernon 1979).

168. 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1982); Regulation 14D, 17 C.F.R. § 240.14d-1 to -100 (1984).

169. 17 C.F.R. § 240.14d-7(a)(1) (1983).

shareholders at a meeting called for that purpose is not in conflict with the federal requirements. The Ohio Control Share Acquisition Act functions to complement, not to obstruct, the Williams Act.

Under the Ohio Act the shareholders, the group meant to be protected by the Williams Act,¹⁷⁰ decide the fate of a tender offer.¹⁷¹ A statutory scheme that gives the final decision whether a tender offer can go forward to the group of people that Congress intended to protect under the Williams Act cannot be construed as preempted by the Williams Act.

VI. THE COMMERCE CLAUSE ISSUE

While the cases holding state takeover statutes unconstitutional prior to *MITE* were mainly based on preemption,¹⁷² in many cases it was also held that the state acts violated the commerce clause.¹⁷³ Since *MITE*, some courts have indicated how they might decide the preemption issue.¹⁷⁴ Due to the uncertainty of the preemption argument, however, courts confronted with the constitutionality of state takeover statutes mainly have addressed whether the statutes violate, directly or indirectly, the commerce clause.¹⁷⁵ The provisions of the Ohio Control Share Acquisition Act are clearly distinguishable from those found violative of the commerce clause, as the following review of cases addressing the commerce clause issue will illustrate.

A. The Commerce Clause in *MITE*

To avoid unconstitutionality under the Supreme Court's *MITE* analysis, the Ohio Act must not directly regulate or indirectly impose burdens on interstate securities transactions that exceed the local interests served by the Act.¹⁷⁶ The basis of the Court's holding in *MITE* was that the burden placed on interstate commerce by the Illinois Business Take-Over Act was not justified by the local interests it purported to serve.¹⁷⁷ The Court found "the effects of allowing the Illinois Secretary of State to block a nationwide tender offer" to be "substantial."¹⁷⁸

Unlike the Illinois Act, no provision in the Ohio Act permits an agent of the

170. See *supra* note 88 and accompanying text.

171. The Williams Act alone does not require a tender offeror to purchase any shares. It only requires that any securities taken up shall be taken on a pro rata basis. Thus, the Act is not violated by an offeror's failure to take up any securities at all. Profusek & Gompf, *State Takeover Legislation After MITE: Standing Pat, Blue Sky, or Corporation Law Concepts?*, 7 CORP. L. REV. 3, 31 (1984).

172. See *supra* note 81.

173. E.g., *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 122 (1st Cir. 1982); *Great W. United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *rev'd on other grounds sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979); *Dart Indus. v. Conrad*, 462 F. Supp. 1, 13 (S.D. Ind. 1978). But see *City Investing Co. v. Simcox*, 633 F.2d 56 (7th Cir. 1980); *Sharon Steel Corp. v. Whaland*, 121 N.H. 607, 433 A.2d 1250 (1981).

174. E.g., *San Francisco Real Estate Investors v. Real Estate Inv. Trust of Am.*, 701 F.2d 1000, 1003 (1st Cir. 1983); *Dan River, Inc. v. Icahn*, 701 F.2d 278, 283 (4th Cir. 1983).

175. E.g., *Mesa Petroleum Co. v. Cities Serv. Co.*, 715 F.2d 1425 (10th Cir. 1983); *Telvest, Inc. v. Bradshaw*, 547 F. Supp. 791 (E.D. Va. 1982); see also *supra* notes 3, 144-45 and accompanying text.

176. *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (applying test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

177. *Edgar v. MITE Corp.*, 457 U.S. 624, 646 (1982).

178. *Id.* at 643.

State of Ohio to decide the fate of a tender offer. The Ohio law only establishes a procedural framework within which the shareholders are ensured an opportunity to make an informed decision on whether the offer will go forward. While the hearing is pending the conditional tender of shares can go forward without impediment or delay.¹⁷⁹

Four Justices in *MITE* thought the Illinois statute directly violated the commerce clause by regulating transactions that took place across state lines.¹⁸⁰ These Justices perceived that the Illinois Act on its face would apply even if none of the target company's shareholders were residents of Illinois, and thus could be applied to regulate a tender offer that would not affect a single Illinois shareholder. They held that because the Illinois statute could regulate commerce that had no impact upon the state, it was an overly broad regulation of tender offers and as such was precluded by the commerce clause.¹⁸¹ The Ohio Act, which only regulates control share acquisitions of companies incorporated under the laws of Ohio,¹⁸² avoids this infirmity. It could not be applied to commerce taking place wholly outside its borders.

In a tender offer, the interests of at least three parties—the offeror, the shareholders and the management of the target company—conflict to some extent. The Williams Act seeks to protect the shareholders while balancing the competing interests of the offeror and target management.¹⁸³ The Ohio Control Share Acquisition Act also seeks to protect the shareholders of organizations incorporated under the laws of Ohio and to balance the competing interests of the offeror and the target company's management. To effectuate this purpose the Ohio Act mandates that a special shareholders meeting be called within ten days of receipt of the Acquiring Person Statement, which presumably will be within ten days of the first public announcement of the tender offer.¹⁸⁴ Within fifty days, well within the sixty days that a tender offer may remain open before shareholders can withdraw their shares under the Williams Act, the shareholders will have the opportunity to cast their votes approving or disapproving the tender offer. In that time they will have received a copy of the Acquiring Person Statement containing all relevant and material information pertaining to the offer, and a statement of the target management's position regarding the offer,¹⁸⁵ which will enable them to make an informed decision. A majority of all shareholders entitled to vote and a majority of disinterested shareholders—those who vote shares that are not owned by the offeror, an officer of the target corporation, or an employee who is a director of the target corporation—must vote in favor of the tender offer in order for it to go forward.¹⁸⁶ The Ohio Act does not distinguish between hostile and friendly tender offers. The shareholder vote is mandatory; it does not hinge upon the discretion of the target's self-interested

179. See *supra* notes 167–69 and accompanying text.

180. 457 U.S. 624, 641 (1982); see *supra* note 40.

181. 457 U.S. 624, 643 (1982).

182. See *supra* text accompanying notes 50–51.

183. *Great W. United Corp. v. Kidwell*, 439 F. Supp. 420, 438 (N.D. Tex. 1977), *aff'd*, 577 F.2d 1256 (5th Cir. 1978), *rev'd on other grounds sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979).

184. See *supra* text accompanying notes 167–69.

185. OHIO REV. CODE ANN. § 1701.831(D)(1)-(2) (Page Supp. 1983).

186. *Id.* § 1701.831(E)(1).

management or of an agent of the state. Neither management nor a state official decides whether the tender offer will go forward; the choice rests with the shareholders. Also, the shareholders may opt to remove their issuing public corporation from the purview of the Act by amending the articles of incorporation or regulations.¹⁸⁷

B. *The Constitutionality of the Ohio Act*

States have a valid interest in the regulation of securities, and have traditionally regulated intrastate securities transactions. On several occasions the Supreme Court has upheld, against commerce clause challenges, the authority of states to enact blue sky laws.¹⁸⁸ A state's regulation of securities offerings and sales is a proper exercise of the police powers reserved and guaranteed by Congress in section 28(a) of the Securities Exchange Act of 1934.¹⁸⁹

Through its Control Share Acquisition Act, Ohio has properly exercised its legitimate state interest in the welfare of shareholders of Ohio corporations. Unlike the Illinois Act in *MITE* or the Delaware Tender Offers Act¹⁹⁰ held unconstitutional in *Dart Industries*,¹⁹¹ the Ohio Act does not change the time in which non-Ohio securities sales will occur, nor does it require the offeror to disclose any information not already mandated by the SEC. Moreover, the Act contains no element of target management favoritism that would rebut Ohio's legitimate intention to protect shareholders and give them an unfettered choice as to whether or not to accept a tender offer.

The Sixth Circuit in *Martin-Marietta Corp. v. Bendix Corp.*¹⁹² went beyond *MITE* to hold "that to the extent state statutes confer power on state authorities to interfere with the timing of an interstate tender offer made under the Williams Act, or to compel the revision of the solicitation or tender offer as a condition of proceeding, they impose an unconstitutional burden on interstate commerce."¹⁹³ As noted above, the Ohio Control Share Acquisition Act allows only the shareholders of the target corporation—the intended beneficiaries of the protection provided by Congress in the Williams Act—¹⁹⁴ ultimately to interfere with a tender offer.

The Sixth Circuit in *Martin-Marietta* also found the extraterritorial effect of Michigan's Take-Over Offers Act to be excessive in relation to the state interest it advanced.¹⁹⁵ Unlike the Michigan Act, which empowered a state administrator to

187. *Id.* § 1701.831(A).

188. *Edgar v. MITE*, 457 U.S. 624, 641 (1982) (citing *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917)); *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U.S. 559 (1917); *Merrick v. N.W. Halsey & Co.*, 242 U.S. 568 (1917). Blue sky laws is the popular name for state statutes providing for regulation and supervision of securities offerings and sales to protect citizen-investors from investing in fraudulent companies. *BLACK'S LAW DICTIONARY* 157 (5th ed. 1979).

189. 15 U.S.C. § 78bb(a) (1982); *see supra* text accompanying notes 113–17.

190. DEL. CODE ANN. tit. 8, § 203 (1983).

191. 462 F. Supp. 1 (S.D. Ind. 1978).

192. 690 F.2d 558 (6th Cir. 1982).

193. *Id.* at 565.

194. *See supra* note 88 and accompanying text.

195. 690 F.2d 558, 566 (6th Cir. 1982) (citing *Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982) (White, J., plurality opinion)). "While protecting local investors is plainly a legitimate state objective, the state has no legitimate interest in protecting non-resident shareholders. Insofar as Illinois law burdens out-state transactions [sic], there is nothing to be weighed in the balance to sustain the law." *Id.*

delay a tender offer indefinitely,¹⁹⁶ the Ohio Act's requirement of shareholder approval of the tender offer is properly within the ambit of internal affairs.¹⁹⁷ The burden imposed on interstate commerce by operation of the Ohio Act is not so great in relation to the state interest in regulation of tender offers as to warrant a finding that it violates the commerce clause.

The view could be taken that if the shareholders of an Ohio corporation vote against a tender offer, the operation of the Ohio Act would stop a nationwide tender offer and hence impermissibly regulate interstate commerce. However, the Ohio Control Share Acquisition Act is a part of Ohio's General Corporation Law, and by providing for a shareholder vote it operates within Ohio's scope of authority to regulate the internal affairs of its corporations.¹⁹⁸ Ohio's authority to govern Ohio corporations through its corporation laws is not restricted to transactions that take place within the state.¹⁹⁹ When a corporation incorporates under Ohio law, it benefits from the operation of Ohio's laws and manifests its consent to be bound by Ohio's General Corporation Law. If an Ohio corporation prefers not to utilize the Control Share Acquisition Act, it may exercise its option not to be bound.²⁰⁰ Moreover, all shareholders have the opportunity to vote, not just the Ohio shareholders. Thus, if a tender offer is thwarted, it has been stopped by the decision of the corporation's shareholders—not by operation of the Ohio Act. The Ohio Act, therefore, merely provides a mechanism to permit the corporation's shareholders to decide the corporation's future.

It is difficult to imagine how a state could protect the interests of its corporations' investors, which Congress has specifically allowed it to do, in a less restrictive manner. Justice Powell, in his concurring opinion in *MITE*,²⁰¹ explicitly noted that the Court's striking down of the Illinois statute as an indirect burden on interstate commerce did not preclude a state from enacting a statute narrowly tailored to protect the state's legitimate interests. Justice Stevens, similarly, in his concurring opinion expressed that Congress' decision to follow a policy of neutrality in the Williams Act is not "tantamount to a federal prohibition against state legislation designed to provide special protection for incumbent management."²⁰² If a narrowly tailored state statute like the Ohio Act is held to be an impermissible burden on interstate commerce, it is difficult to conceive how a state legislature could enact a statute pertaining to takeover offers that would be constitutional. The practical effect of such a decision would be a de facto preemption of the ability of states to regulate tender

196. MICH. COMP. LAWS ANN. § 451.914 (Supp. 1984-1985).

197. See Shipman, *supra* note 157, at 740.

198. "The legitimacy of a state's interest in regulating the terms under which corporations may organize and reorganize has long been recognized. . . . [S]tate law governs the internal affairs of a corporation, and the validity of such regulation is beyond preadventure except as to circumstances in which Congress . . . has expressly ordained otherwise." Profusek & Gompf, *State Takeover Legislation After MITE: Standing Pat, Blue Sky or Corporation Law Concepts?*, 7 CORP. L. REV. 3, 37 (1984). "Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that . . . state law will govern the internal affairs of the corporation." *Cort v. Ash*, 422 U.S. 66, 84 (1975).

199. See *supra* note 157 and accompanying text.

200. See *supra* text accompanying note 52.

201. 457 U.S. 624, 646 (1982) (Powell, J., concurring).

202. *Id.* at 655 (Stevens, J., concurring).

offers. This result, however, would directly contradict the concurring opinions of Justices Powell and Stevens, which specifically reject foreclosing states from regulating tender offers.²⁰³ It would also fly in the face of congressional intent as evidenced by Congress' refusal to adopt any amendments to the Williams Act that would prohibit state regulation of takeovers.²⁰⁴ The Ohio Legislature, in enacting the Ohio Control Share Acquisition Act, has acted within its powers.

VII. CONCLUSION

The Ohio Control Share Acquisition Act was drafted after the Supreme Court decided *Edgar v. MITE Corp.*. The Ohio Legislature clearly attempted to provide shareholders of target Ohio corporations with protection not provided by the Williams Act. Congress has not expressly evidenced an intent to preempt state regulation of tender offers, and by its actions has indicated an unwillingness to do so. The Securities Acts of 1933 and of 1934 were enacted to provide full disclosure and prevent fraud in securities regulation and distribution, and were structured to allow concurrent regulation by states. A finding that the Ohio Act is unconstitutional would operate to prohibit any state regulation of tender offers, hostile or friendly. This action would be without congressional mandate and in violation of the federal scheme of securities regulation.

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203. "I join Part V-B [the portion of the opinion holding the Illinois Act indirectly violates the commerce clause] because its Commerce Clause reasoning leaves some room for state regulation of tender offers." *Id.* at 646 (Powell, J., concurring).

204. The following recommendation was made to Congress in 1976:

A majority of the Subcommittee [Subcommittee on Proxy Solicitations and Tender Offers of the Federal Regulation of Securities Committee of the American Bar Association's Section of Corporation, Banking and Business Law] believes federal preemption is indicated because there is a particular need for uniformity in the area of tender offer legislation and because state laws are too pro-management.

State Takeover Statutes and the Williams Act, 32 BUS. LAW. 187, 193 (1976). In 1984 a legislative package, the Tender Offer Reform Act of 1984, H.R. 5693, 98th Cong., 2d Sess., 130 CONG. REC. H4359 (daily ed. May 22, 1984), was presented to Congress by the SEC. The Act, which was not acted on but will be considered by the 99th Congress, is aimed at curtailing the excesses and abuses of corporate management when defending against takeovers by eliminating "golden parachutes," "poison pills," and "greenmail" during tender offers. According to Timothy W. Wirth, Chairman of the Subcommittee on Telecommunications, Consumer Protection and Finance of the Committee on Energy and Commerce of the House of Representatives (which adopted the Act), the Act intended to improve the fairness of the tender offer process by providing additional time for shareholders and corporate managers to evaluate the proposed transactions, greater disclosure of the impact of the impending takeover, and increased shareholder participation in certain corporate transactions. Letter from Timothy W. Wirth to Thomas P. O'Neill, Jr., Speaker of the House of Rep. (Oct. 1, 1984).

That the Act was designed, in the words of John S.R. Shad, Chairman of the Securities and Exchange Commission, to "enhance shareholder protection without unduly intruding into state corporate law" (see FED. SEC. L. REP. (CCH) Report No. 1074 (May 30, 1984)), is a recognition of the longstanding scheme of state and federal co-regulation of tender offers.

In opposition to the proposed Act Donald T. Regan, former Secretary of the Treasury, has expressed the Administration's belief that H.R. 5693 would "intrude unnecessarily into State law, and constitute an unwarranted step toward imposition of a substantive federal corporation law." He has endorsed further exploration of the issues addressed by the Act. Letter from Donald T. Regan to John D. Dingell, Chairman of the Committee on Energy and Commerce (Sept. 25, 1984).

No action was taken on H.R. 5693 in 1984 so that further hearings could be held by Congress and more of the issues could be fully addressed. Among the questions to be considered, according to H.R. REP. NO. 1028, 98th Cong., 2d Sess. 1 (1984), is the proper relationship between state and federal law in regulating the takeover process. The Report notes that on two occasions the National Association of Attorneys General has adopted resolutions urging that state regulation in the takeover area be recognized. *Id.* at 13. The resolutions are based on the premise that state regulation has been more effective than federal regulation in providing the board of directors and shareholders of the target with adequate time, disclosure, and power to consider all possibilities and take action that results in the most favorable outcome for the shareholders. *Id.*